

National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: December 19, 1997

TO: Ralph R. Tremain, Regional Director, Region 14

FROM: Barry J. Kearney, Associate General Counsel, Division of Advice

SUBJECT: Four Flags Motors, Case 14-CA-24794

530-4080-5084-5000, 530-8027-8300

This Section 8(a)(5) case was submitted for advice on whether the Union actually lost majority support prior to accepting a negotiated bargaining agreement and, if so, whether the Employer therefore was privileged to withdraw recognition despite the decision in *Auciello Iron Works*.⁽¹⁾

We conclude, for the reasons set forth in the Region's November 25 Request for Advice, that the Union in fact lost majority status when the only two unit employees expressed to the Employer their repudiation of Union representation.⁽²⁾ We also conclude, in agreement with the Region, that *Auciello* is not controlling and that the instant charge should be dismissed, absent withdrawal.

In *Auciello*, the Supreme Court held that an employer cannot withdraw recognition or refuse to execute an agreed upon bargaining agreement based upon a mere good-faith doubt of the union's majority status, where that good-faith doubt was premised upon events known to the Employer prior to the union's acceptance of the bargaining agreement. However, the Court specifically declined to address the circumstances in this case, viz., where the union in fact had lost majority support.⁽³⁾ The Board itself also had limited its decision to circumstances involving a mere good-faith doubt.⁽⁴⁾ We would not apply the *Auciello* rationale, which essentially is based upon an employer's failure to act quickly, to the instant case involving the Union's actual loss of majority.

In this regard, we note the long standing practice of General Counsel to dismiss charges alleging that an employer unlawfully withdrew recognition after the certification year, or after expiration of a contract, in circumstances where the union has in fact lost majority status.⁽⁵⁾ It is well settled that "the mere filing of a decertification petition does not relieve the employer of its obligation with the union."⁽⁶⁾ However, where an RD petition reflects that a majority of unit employees no longer desire to be represented by the union, we do not issue a Section 8(a)(5) complaint because we know, regardless of whether the employer also knows, that the union's majority presumption has been rebutted.⁽⁷⁾ This long-standing policy recognizes that issuance of complaint would run directly afoul of the policies of the Act to impose a collective-bargaining representative on employees against their stated will.

Given our treatment of a union's actual loss of majority support in circumstances involving majority based RD-petitions, we would not apply the *Auciello* rationale in the "loss of majority support" circumstances here. In sum,

the Region should dismiss the instant charge and process the Employer's RM petition.⁽⁸⁾

B.J.K.

¹ *Auciello Iron Works, Inc. v. NLRB*, 116 S.Ct. 1754, 152 LRRM 2385 (1996).

² When employee Abert delivered to the Employer a copy of his "withdrawal" letter to the Union, Abert stated to the Employer that he "did not want the Union anymore" and had "decided to drop out of the Union and represent himself..." Employee Winkelman stated to the Employer in similar circumstances that he had "given up on the Union" and "decided to represent himself."

³ 116 S.Ct. at 1757, n.2.

⁴ The Board noted the clear distinction between cases involving a mere good-faith doubt as opposed to an actual loss of majority. 317 NLRB 364, 365 at note 14 (1995).

⁵ See, e.g., Ayers Corp., Case 21-CA-29761, Advice Memorandum dated July 18, 1994; J.P. Data Com, Cases 21-CA-26562 and 26579, Advice Memorandum dated April 3, 1989.

⁶ W.A. Krueger Co., 299 NLRB 914, 916 (1990); A.W. Schlesinger Geriatric Center, 304 NLRB at 300.

⁷ Ayers Corp., *supra*.

⁸ See Newark Electronics, Case 13-CA-32255, Advice Memorandum dated September 5, 1995 (copy enclosed), authorizing dismissal of 8(a)(5) allegation in view of majority decertification petition, and the further processing of an RD petition in order to have the employees' representational wishes determined in a Board election.